No. 92-1745

Supreme Court, U.S.
FILED
MAR 12 1993
OFFICE OF THE CLERK

IN THE SUPPEME COURT
OF THE UNITED STATES,
OCTOBER TERM, 1992

VERNON R. JANTZ, Petitioner

v.

CLEOFAS F. MUCI, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a public school principal, who denies employment to a teacher in 1988, based on the teacher's alleged "homosexual tendencies" or homosexual status, is qualifiedly immune from liability in his individual capacity, under 42 U.S.C., section 1983.

2. Whether a public school principal is liable in his official capacity for discrimination based on sexual orientation, under 42 U.S.C., section 1983, where the school board has delegated to the principal the power to make hiring decisions without retaining the right to review the selection process carried out by the principal.

3. Whether discrimination based on sexual orientation is subject to heightened scrutiny.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this court contains the names of all parties to the proceedings in the United States Court of Appeals for the Tenth Circuit.

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IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1992

VERNON R. JANTZ, PETITIONER

V.

CLEOFAS F. MUCI, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Vernon R. Jantz, the petitioner herein, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on October 9, 1992.

OPINIONS BELOW

The October 9, 1992 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reported at 976 F.2d. 623; a copy of the original opinion is

reprinted in the Appendix . The prior decision of the United States District Court of the District of Kansas, entered on March 29, 1991, is reported at 759 F. Supp. 1543, and is reprinted in the Appendix.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was entered on October 9, 1992. Petitioner filed a timely petition for rehearing in the Court of Appeals. The Court of Appeals denied Petitioner's Motion for Rehearing on December 14, 1992; the order denying the rehearing is reprinted in the Appendix. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States. Said section reads as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves 42 U.S.C., section 1983. Said section reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or

other persons within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

Petitioner alleges a violation of his right to equal protection under the Fourteenth Amendment to the United States Constitution and brings this action under 42 U.S.C., Section 1983. Mr. Jantz contends that in 1988 respondent denied him employment as a teacher at Wichita North High School, Wichita, Kansas because respondent perceived petitioner to have "homosexual

tendencies."

Respondent was at all material times to this lawsuit principal of Wichita North High School. He was sued in both his individual and official capacities.

During the 1987-88 school year petitioner taught social studies in the Wichita public schools, including North High School, as a substitute teacher. Mr. Jantz was certified to teach social studies by the State of Kansas.

In 1987 Mr. Jantz asked the District Director of Secondary Personnel about the possibility of obtaining a full time teacher's position for the 1987-88 school year.

Mr. Jantz was interviewed by the associate principal of Wichita

North High School. However, as it turned out, no jobs became available for the 1987-88 school year. The district gave principals the responsibility for selecting teachers.

In 1988 there was an opening for a social studies position at Wichita North High for the 1988-89 school year. Petitioner was not interviewed again but was considered by respondent Muci. An individual named Mathew Silverthorne was hired by Mr. Muci instead of petitioner. Silverthorne and Jantz were the only applicants for the position. Petitioner had been recommended for the position by North High's coordinator of the Social Studies Department, William Jenkins and was highly regarded by students and

faculty.

In the 1987-88 school year Mr. Muci's secretary had suggested to him that Mr. Jantz was like her ex-husband who is gay. When petitioner was turned down in favor of Mr. Silverthorne, Mr. Jenkins asked Muci the reason petitioner was not hired. Mr. Muci's response to this inquiry, according to Jenkins, was that Jantz was not hired because of his "homosexual tendencies."

Mr. Muci did not deny he had made reference to "homosexual tendencies" of petitioner but claimed in this proceeding that Silverthorne was a superior candidate because he had coached at North High while serving as a student teacher. He asserted that such was the reason he rejected Jantz.

Muci claimed he needed the holder of the position to coach part time. Petitioner was not asked during his interview by the associate principal whether he could coach but would have responded in the affirmative if he had been asked. Petitioner had experience in basketball, soccer, baseball and tennis. Petitioner maintains that he has superior credentials to Silverthorne as regards education and experience. In the trial court Muci did not attempt to articulate a justification for denying Jantz employment on the basis of perceived "homosexual tendencies."

It should be noted that there was no evidence of homosexual conduct on the part of Mr. Jantz or public advocacy of the homosexual

life-style by him.

Petitioner had followed the prescribed procedure for applying for a full time position. When an individual applies for employment with the school district the first task of the district's central office is to determine whether the applicant is eligible for certification or is certified by the State of Kansas. When there is a vacancy the principal must notify the central office. Notices of openings are announced in the district newsletter. After an eligible individual applies for a position, he or she is requested to contact the building principal about vacant positions. The building principal is given the discretion by the district to determine whether an

individual applicant will be interviewed. If a building principal does not wish to interview someone, such decision is not reviewed by the district's central office. Building principals are not required to submit any written statements or reports concerning their interviews or their recommendations. The criteria for selection and approach used in conducting the interview are left to the sole discretion of the building principal. After the interview or interviews the building principal submits the name of the person selected by him to the central office; the building principal does not submit the names or credentials of applicants not hired. The central office is not informed of the identity of the

latter. The district's "Director of Secondary Personnel" testified that rejection of a building principal's choice by the district office "rarely" happens. The primary function of the central office is to check to make sure that the individual selected is certified in the state or eligible for certification by the State of Kansas. The district's school board makes the formal hiring decision pursuant to Kansas statutes and is the governing body of the school district.

After petitioner filed suit Mr. Muci filed a motion for summary judgment in which he argued that as regards the claim brought against him in his individual capacity he was qualifiedly immune and that with respect to the official capacity

action respondent was not granted final policymaking authority under state law and therefore said action should be dismissed. The trial court, in overruling the motion for summary judgment, held that Muci could not rely on the doctrine of qualified immunity inasmuch as there was no evidence presented by the defense of any rational basis which would justify discrimination based on alleged "homosexual tendencies". (See trial court decision which is reprinted in the Appendix). The trial court found 1that it was clearly established law in 1988 that government cannot discriminate arbitrarily without rational motivation and in effect found that there was sufficient evidence that Muci had final

policymaking authority regarding hiring decisions for purposes of deciding the motion for summary judgment.

The Court of Appeals for the Tenth Circuit reversed the District Court. (See Court's decision reprinted in the Appendix.) The Court held in effect that the defense of qualified immunity precluded petitioner's equal protection claim by reason of this Court's decision in Bowers V. Hardwick, 478 U.S. 186, 194 , 106 S.Ct. 2841, 92 L. Ed. 2d 140 (1986) The Court of Appeals embraced the view that the law in 1988 did not clearly prohibit Muci from denying employment to Jantz, because of Jantz's sexual orientation or perceived sexual orientation, without having to

establish a rational basis for such decision. The Court also held that the trial court erred in not entering summary judgment on the official capacity claim on the ground that the school board retained the right to review hiring decisions of district principals. It should be noted that as regards the official capacity claim the District Court applied heightened scrutiny to discrimination based on sexual orientation. The Court of Appeals did not reach the question of the appropriate standard for review.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals decision conflicts directly with applicable decisions of this Court as regards petitioner's claims against respondent in both his individual and official

capacities.

This case involves the question of whether governmental officials, acting in their individual capacities, have an absolute obligation to refrain from status-based discrimination unless the action is justified by a legitimate governmental purpose. A correct application of this Court's decisions related to traditional rational basis review of discrimination directed towards persons in non-suspect and non-quasi-suspect categories would have rendered such obligation applicable to Muci in 1988.

The Court of Appeals decision in this case is inconsistent with the Court's decisions in City of Cleburne v. Cleburne Living Center,

473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d. 313 (1985) and United States Dept. of Agriculture v. Moreno, 413 U.S. 528, 37 L.Ed.2d. 782, 93 S.Ct. 2821 (1973).

Long before 1988, when Muci refused Jantz employment, the Supreme Court had established that where heightened scrutiny of the governmental classification is not appropriate, the classification must be "rationally related to a legitimate governmental interest." Moreno, 413 U.S. 528, 533, 37 L.Ed.2d. 782, 787, (1973)) (Emphasis supplied) The Court in City of Cleburne v. Cleburne Living Center, supra, stated that a governmental authority "may not rely on a classification whose relationship to an asserted goal is so attenuated as

to render the classification arbitrary or irrational".

Accordingly, in 1988, the unlawfulness of denying employment to Jantz because of irrational prejudice against persons categorized as having a homosexual orientation or status should have been "apparent" to Muci.

In this case Muci's concern about Jantz was related to unreasoning, visceral prejudice on his part.

This Court has never sanctioned governmental discrimination based on an illicit motive or public prejudice. In 1986 the court in Yick Wo v. Hopkins , 118 U.S. 355, 6 S.Ct. 1064, 30 L.Ed. 220 (1986) held that if an ordinance is "applied and administered by public authority with the

evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." This Court in Sunday Lake Iron Company V. Township of Wakefield, 247 U.S. 350, 38 S.Ct. 495, 62 L.Ed. 1154 (1918) stated the applicable rule as follows:

> "The purpose of the Fourteenth Amendment is to secure to every person within the States jurisdiction against intentional and arbitrary discrimination whether by exercise of a statute or by its improper execution through duly constituted agents."

The Court in U.S. Department of Agriculture V. Moreno, supra, held

that if the constitutional conception of 'equal protection of the laws' means anything it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." The Court in Palmore V. Sidoti, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d. 421 (1984) stated as follows:

> "Private biases may be outside the reach of the law, but the law cannot directly or indirectly, give them effect."

Numerous lower courts have followed the above reasoning and thus have recognized that governmental discrimination is not legitimate where such results from fear or prejudice towards a particular category of persons, or from bias based on

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stereotyping. (See Sullivan V. City of Pittsburgh, 811 F.2d. 1171, 185(3rd Cir)cert denied, 484 U.S. 849 (1987); United States V. Yonkers Board of Education,837 F.2d. 1181 (2nd Cir)cert denied, 486 U.S. 1055 (1988); J.W. V. City of Tacoma, 720 F.2d. 1126, 1129, (9th Cir. 1983); Burstyn V. City of Miami Beach, 663 F. Supp. 528, 537, (S.D. Florida 1987); and Wauchope V. United States Department of State, 756 F. Supp. 1277, 1285, (N.D. Cal. 1991)) Furthermore, lower courts have recognized that where religious beliefs from the basis of the adverse action by government such beliefs do not constitute a legitimate governmental interest. (Marks V. City of Chesapeake, 883 F. 2d. 308, 311, (4th Cir. 1989); and Islamic Center of

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Mississippi V. City of Startsville, 840 F.2d. 293, 302, (5th Cir. 1988)

The Court of Appeals' decision would permit the doctrine of qualified immunity to shield governmental officials from liability even where the officials action is based on hatred, dislike, or fear of a particular group provided there is no case law specifically outlawing the precise discrimination involved. Such an approach is not consistent with this Court's requirement that governmental officials can only discriminate against persons in non-suspect or quasi-suspect categories if there is a rational basis for doing so. The said approach was not sanctioned by this Court in Anderson V. Creighton, 483 U.S. 635, 97

L.Ed.2d. 523, 107 S.Ct. 3034 (1987). In that case the Court did not require that a plaintiff must present analogous court decisions which would be factually identical or on "all fours" with the pending case. The Court, in discussing the parameters of the defense of qualified immunity stated as follows: "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." The facts of this case are sufficiently analogous to the decisions in U.S. Department of Agriculture V. Moreno and City of Cleburne V. Cleburne Living Center, Inc. supra , and similar pre-1988 decisions of this court which render unlawful wholly arbitrary and

irrational discrimination by government even where heightened scrutiny is not to be applied. The Court of Appeals applies an overly narrow and technical view of qualified immunity which if accepted, would undermine the right to equal protection by categories of persons who have not been granted any special protection under the Constitution. It was unreasonable, under the objective test of Harlow V. Fitzgerald, 457 U.S. 800, 818, 73 L.Ed.2d. 396, 102 S.Ct. 2727 (1982), for Muci to have concluded that such discrimination was permissible.

The Court of Appeals in its opinion recognized that respondent had not established a rational basis for denying Mr.Jantz employment in the

record and that in general arbitrary governmental discrimination is prohibited under the equal protection clause. The Court, however, then erroneously sought to supply its own rational basis by arguing that in the absence of decisions to the contrary this Court's decision in Bowers V. Hardwick 478 U.S. 186 194, 106 S.Ct. 2841, 91 L.Ed.2d. 140, (1986) establishes a rational motivation (i.e., "the community's notions of morality") for governmental discrimination against job applicants who are gay or perceived to be gay, as a matter of law. Such interpretation is inconsistent with the equal protection analysis set forth in Palmore V. Sidoti, supra. (See Pruitt V. Cheney 963 F.2d. 1160, 1165, (9th Cir.

1991)). The Bowers decision did not involve the equal protection clause and therefore is not applicable. Furthermore, it concerns conduct not status.

Professor Sustein has noted in his article titled "Sexual Orientation and the Constitution" in 55 University of Chicago Law Review, pp. 1161, 1167 (1980) that under the equal protection clause "It is always immaterial to an equal protection challenge that members of the victimized groups are engaging in conduct that could be prohibited on a general basis." The equal protection clause, as Professor Sustein emphasized, was intended to provide judicial protection to disadvantaged groups regardless of whether society

approves or disapproves of the conduct of which members of the group participate.

The decision in Bowers V. Hardwick, supra, does not preclude a finding that forms of homosexual intimacy not proscribed by sodomy statutes should be subject to the equal protection clause. Bowers does not support the notion that "moral" disapproval of mere homosexual orientation or status provides a rational basis, under the equal protection clause, for governmental discrimination against persons classified under the heading "homosexual orientation". The Court of Appeals gives overly broad scope to the Bowers opinion in an attempt to discover a rational basis not supplied

by respondent.

The Court of Appeals' disposition of the claim brought against Muci in his official capacity is not consistent with this Court's decision in City of St. Louis V. Praprotnik, 485 U.S. 112, 99 L.Ed.2d. 107, 108 S. Ct. 915 (1988) in that the Court of Appeals found that Muci did not have final policymaking authority even though the decision under attack, i.e., the decision to reject Jantz, was not subject to review by the board given the management practice of the board which state law did not prohibit. The Kansas Court of Appeals in Linnens V. Christensen, 646 P.2d. 1141 (Court of Appeals of Kansas, 1982) held that Kansas law recognizes that local school boards are given as

"free hand as possible in the operation and organization of their school system" and that each "school board should be allowed to adopt its system to the peculiar situation existing in its district." The hiring of Silverthorne was subject to approval by the board under state law; the formal decision to hire the person whose name is submitted to the board could not be absolutely delegated. However, because the school district delegated to principals the unbridled discretion over the selection process, the board did not know the process or the criteria used by the principal in making the hiring decision or the names and qualifications of the applicants rejected or not interviewed. The school board thus

did not retain the right to review the selection process. As a result, the board was able to insulate itself from liability shutting its eyes to the actual selection process of the principal. This court held in Praprotnik that such attempt at insulation undermines section 1983 and should not be permitted.

Principals such as Muci, were granted the power to "adopt a course of action consciously chosen from various alternatives" which rendered them policymakers (see Oklahoma City V. Tuttle, 471 U.S. 822, 105 S. Ct. 2435, and 85 L.Ed.2d. 791 and Pembaur V. Cincinnati 475 U.S. 483, 106 S.Ct. 1292 and 89 L.Ed.2d. 452 (1986) Muci was not carrying out hiring policy; he was establishing

it. Respondent could exclude applicants he perceived to be gay in the absence of review or accountability; such rendered his rejection of applicants, based on his own criteria, a "final" decision.

2. Certiorari Should be Granted to Resolve Conflicts in Principle Among the Courts of Appeals.

The Court of Appeals in this case held in effect that this Court's decision in Bowers v. Hardwick, supra, had changed the law as regards the application of rational basis review to classifications which disparately affect homosexuals. The Court had, in fact, applied traditional rational basis review regarding homosexuals in Rich v. Secretary of the Army 735 F.2d. 1220, 1229 (10th Cir. 1984) and

National Gay Task Force v. Board of Education. 729 F.2d. 1270, 1273 (10th Cir., 1985) prior to 1988. One may infer that but for Bowers the Court would have held that the law of the Circuit recognizes a clearly established right of persons having a homosexual orientation or perceived homosexual orientation to equal protection of the law in the absence of a showing by the government of a rational basis for the differential treatment.

The Tenth Circuit's interpretation of Bowers is in conflict with that of the Ninth Circuit Court of Appeals in Pruitt V. Cheney. 963 F. 2d. 116. 1166 (9th Cir, 1991) and High Tech Gays V. Defense Ind. Sec Clearance Off. 895 F.2d. 563

(9th Cir. 1990) The Court in Pruitt V. Cheney stated that:

> "It should be noted that in High Tech Gays, we engaged in active rational basis review despite our conclusion that Bowers V. Hardwick 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d. 140 (1986) militated against a higher lever of scrutiny. High Tech Gays , 895 F.2d. at 573, n.9.
> Hardwick had ruled that homosexuals could not rely on a right of privacy to exempt them from criminal laws proscribing sodomy. In relying on Hardwick to negate a higher standard of equal protection review, we noted that Hardwick, like High Tech Gays, was a case relating to conduct not orientation. Hardwick is therefore, even less of a barrier to active rational basis review in this case than it was in High Tech Gays." (at p. 1166, n.5)

The Court in Pruitt v. Cheney , supra, also stated as follows:

> "It is clear, then, that in High Tech Gays, upon plaintiff's showing of discrimination, we required

> the government to establish on the record that its policy had a rational basis. The Supreme Court imposed the same requirement in Cleburne. Neither case supports the contention of the Army here, that its far more rigid discrimination against homosexuals should be held to be rational, as a matter of law, without any justification in the record." (Emphasis supplied).

The Court in Pruitt V. Cheney applied a rational basis review in considering the Navy's discharge of a homosexual. The Court held that homosexual status alone did not provide a rational basis.

The Tenth Circuit Court of Appeals decision in this case also conflicts with the Seventh and District of Columbia's Circuits' view that government must justify differential treatment of persons with

a homosexual orientation under the traditional rational basis standard of review and that Bowers V. Hardwick, supra is inapplicable for equal protection purposes even though homosexual conduct may constitutionally be criminalized. (Ben-Shalom V. Marsh, 881 F.2d. 454, 464 (7th Cir.1989); Doe V. Casey, 796 F.2d. 1508, (D.C. Cir. 1986) and Doe V. Gates 60 E.P.D. 41 949 (D.C. Cir. 1993))

3. The Court of Appeals Has Decided Important Questions of Federal Law Which Have Not Been, But Should Be Settled By This Court.

The Court should decide the novel question of whether homosexual status or perceived homosexual status, as distinct from homosexual conduct,

provides a rational basis, as a matter of law, after this Courts Decision in Bowers V. Hardwick, supra, for excluding persons from governmental service inasmuch as there is substantial uncertainty, as to whether, as a result of the Court of Appeals decision in this case, persons categorized as having a homosexual orientation are entitled to at least traditional rational basis review. Can government discriminate against persons simply because they are labeled as having a homosexual orientation without specifying a rational governmental purpose?

As regards the claim brought against Muci in his official capacity the issue of what should be the appropriate standard of review is

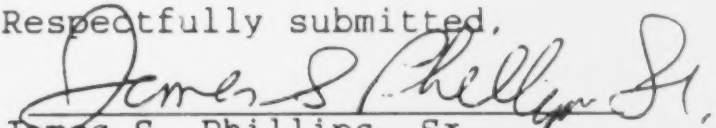
relevant given the inapplicability of the defense of good faith. The trial court correctly held that discrimination based on sexual orientation is now entitled to greater than rational basis review; that it now merits heightened scrutiny in light of the criteria set forth by the Court in Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 49 L.Ed.2d. 520, 96 S.Ct. 2562 (1976) and Plyler v. Doe, 457 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d. 520 (1983). While the Court of Appeals did not directly reach this question because of its ruling on the liability of respondent in his official capacity the panel made clear that it deemed itself bound by a previous Tenth Circuit ruling that sexual orientation is not a .

suspect category. The Court of Appeals position on heightened scrutiny as regards sexual orientation, should be reviewed by this Court given the importance of the issue to millions of citizens of the United States, the development of the law in general, and the relevance of the question to the official capacity action.

CONCLUSION

Accordingly, a writ of certiorari should issue to review the judgment.

Respectfully submitted,



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